MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on March 21, 2003 at 8:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:
Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Cindy Peterson, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted:	HB 456, 3/12/2003; HB 141, 3/10/2003; HB 293, 3/10/2003; HB 308, 3/10/2003
Executive Action:	HB 289; HB 331; HB 404; HB 448; HB 453; HB 308; HB 536

EXECUTIVE ACTION ON HB 289

Motion: **SEN. DAN McGEE** moved **HB 289 BE CONCURRED IN.**

Discussion:

CHAIRMAN DUANE GRIMES explained that **Rep. Newman's** original purpose was to treat the refusal as a separate criminal offense. **CHAIRMAN GRIMES** asked **Rep. Newman** if there were constitutional issues with his original proposal.

Ms. Valencia Lane remembered **Rep. Newman** indicating there was not a constitutional problem with making refusal to blow a crime, but he did indicate there were constitutional concerns on several other sections.

SEN. MIKE WHEAT will resist amending this bill. If someone gets stopped and refuses a breath test this will step the law up a notch and will add an instruction to the jury that they can infer from that refusal that the offender was under the influence of alcohol. **SEN. WHEAT** believes that will have the impact needed by prosecutors in dealing with DUI offenses. As presented in the original bill if an offender refuses, an offender can be charged with a separate offense. The Committee has raised the fines for DUI, increased the penalties, lowered the threshold on what constitutes DUI. This is the third leg for the prosecutors.

CHAIRMAN GRIMES wondered how a separate crime would affect the DUI charges.

SEN. WHEAT feels this bill will allow the prosecutor to say to a jury that an offender had the opportunity to take a breath test, chose not to, and the jury can infer that the defendant was under the influence of alcohol.

SEN. DAN McGEE does not like the concept of presumption of rebuttable inference. He feels a person is either guilty or innocent, and in this country, a person is innocent first, and it is the duty of the state to prove guilt. This bill will change the rebuttable presumption from presumed innocent to presumed guilty. He does not drink and, therefore, would refuse a breathalyser. In trial, the jury would be allowed to infer guilt from that refusal to blow. Proving someone guilty is the responsibility of the state.

SEN. JERRY O'NEIL feels the Fifth Amendment guarantees one's right not to testify against himself. Implied consent gives up that right. **SEN. O'NEIL** feels the bill goes too far.

SEN. GARY PERRY participated in the .08 experiment and asked if the field sobriety tests are required before the breathalyser can be administered.

SEN. BRENT CROMLEY stated normally the field sobriety test is administered, but it is not necessary. There does have to be an arrest for probable cause to believe a person is driving under the influence.

SEN. PERRY stated there are performed actions which would require arrest and a trip to the police station before the point of a breath test is reached. Therefore, the example given my **SEN. McGEE** would not be applicable since his actions would not warrant a breath test.

SEN. JEFF MANGAN supports the bill in its current form since it strengthens the system. He pointed out a jury will make a determination based on the evidence.

CHAIRMAN GRIMES corrected himself where he referred to a "presumption" rather than an "inference." He believes the two terms have a significant difference in meaning.

Ms. Lane stated that the title as amended on line 16 says the bill is amending 61-8-401 and the bill is actually amending 61-8-404. **Ms. Lane** stated this is a critical error in the title and should be corrected.

Motion/Vote: **SEN. McGEE** moved **HB 289 BE AMENDED** to change page 1, line 16, to change 61-8-401 to 61-8-404. The motion **carried UNANIMOUSLY.**

Motion: **SEN. McGEE** moved **HB 289 BE CONCURRED IN AS AMENDED.**

Discussion:

SEN. CROMLEY stated he liked the bill better the way it was originally. He has constitutional concerns about inferring from a person's failure to take the test that he/she is guilty. **SEN. CROMLEY** feels this is contrary to some sound legal principles, such as not inferring guilt from a person's refusal to testify.

CHAIRMAN GRIMES reminded the Committee driving on Montana's highways is a privilege, not a right. He feels an inference would not depart too dramatically from what would be reasonable and expected.

SEN. O'NEIL stated losing your driver's license for failure to blow is a penalty and asked if that was basically the same thing.

SEN. CROMLEY admitted he has not thought this issue through as far as he should, but in his mind it is not the same thing. That is why he almost agrees with the earlier version of the bill since you give your consent to a breath test if you drive on the highways of Montana and law enforcement has probable cause to believe you are driving under the influence. Therefore, if you refuse the test, you are guilty of the crime of not giving the test. **SEN. CROMLEY** cannot justify taking that next step and saying refusal makes you guilty of another crime. He feels it conflicts with a person's constitutional right to remain silent.

SEN. MANGAN, in reading subsection (2), stated the refusal is already admissible. The bill will allow the trier-of-fact to look at all the evidence, including that refusal, to determine whether the person was under the influence.

CHAIRMAN GRIMES stated in his mind they are not demonizing the refusal, just clarifying what the refusal infers.

SEN. O'NEIL asked if refusal to take a breath test is admissible in a DUI trial.

SEN. MANGAN stated he is reviewing subsection(2) beginning on line 13 which says proof of refusal is admissible in any criminal action or proceeding arising out of the acts alleged to have been committed.

SEN. McGEE held that this is hard evidence and it is legitimate for the court to hear because it is a fact. He wonders still why the law would allow for inference to replace fact as evidence and then take it further and allow for the inference to be rebuttable on the part of the defendant. **SEN. McGEE** suggested it should be a rebuttable inference on the part of the prosecution, which is the basis of our jurisprudence.

SEN. O'NEIL wondered how we could have a law that would allow a jury to hear evidence, but not allow them to infer anything from that evidence. This is fictional to **SEN. O'NEIL.**

SEN. CROMLEY responded that if he were the judge he would give the jury an instruction that they could not infer or presume from a person's failure to take a test that he/she is guilty. As an example, if a person does not testify in his own defense, the jury may infer that person is guilty. However, the court will typically give an instruction to the jury that they should not infer guilt from the lack of a defendant testifying.

SEN. O'NEIL asked why a judge would allow a jury to hear evidence if they were not allowed to infer anything from the evidence.

SEN. CROMLEY stated that is provided for in the law. Obviously, if a defendant does not testify, the jury will know they are not testifying.

SEN. O'NEIL could not see any reason for the court to allow a jury, or even the court, to hear evidence of whether someone refused to take a breathalyser or blood test when the jury is precluded from making an inference from that fact. **SEN. O'NEIL** feels the law should go one way or another. Either the evidence is admissible and the jury can infer from it or it is not admissible.

CHAIRMAN GRIMES agreed with **SEN. O'NEIL.**

SEN. PERRY asked **SEN. O'NEIL** if he had a problem with the new section on page 1 of the original bill, and a person's refusal to take the test.

SEN. O'NEIL replied he absolutely had a problem with that section since absolute liability referred to in 45-2-104 is imposed for refusal to take a properly requested test. In **SEN. O'NEIL's** mind this is going overboard. The Fifth Amendment says a person shall not be required to testify against themselves. Having a driver's license should not require a person to give up Fifth Amendment protection.

Vote: **SEN. McGEE's** motion **HB 289 BE CONCURRED IN AS AMENDED carried** with **Senators Cromley, Curtiss, McGee and O'Neil voting no. SEN. WHEAT** will carry the bill on the Senate floor.

EXECUTIVE ACTION ON HB 331

Motion: **SEN. CROMLEY** moved to **INDEFINITELY POSTPONE HB 331.**

Discussion:

SEN. MANGAN stated indefinitely postponing the bill will leave the law in its original form as currently on the books. Someone having property they can use day in and day out without paying for it is a criminal act.

(Tape : 1; Side : B)

CHAIRMAN GRIMES agreed stating he leases property for a living and would hate to add up the amount of money he has lost over the past year.

SEN. O'NEIL feels this bill will take teeth away from businessmen. Present law makes it a crime if a person fails to return rented equipment. HB 331 will make it a civil penalty rather than a criminal offense. Making it a criminal penalty will establish a debtor's prison. **SEN. O'NEIL** had thought applying the theft of services statutes would have been more effective. In addition, a person has lien rights they can exercise if the rented property was over $250. Also, a business could require a post-dated check as a deposit for rented equipment. **SEN. O'NEIL** feels this bill will take protection away from a rental agency.

SEN. PERRY discussed the bill with some of the proponents after the hearing and he was told by a proponent that they did file liens. **SEN. PERRY** feels the proponents have legitimate concerns. On the other hand, disputes are ten percent of the problem and are not covered in their contracts. Also, in looking at the civil versus criminal issue, **SEN. PERRY** believes breach of contract law should apply. Therefore, **SEN. PERRY** would like to see rental businesses take positive steps to solving this problem prior to passing legislation.

SEN. WHEAT agreed with **SEN. PERRY** and referred to the proposed legislation as "creeping criminalization." Although **SEN. WHEAT** is sympathetic, he feels there are other steps that can be taken without attempting to criminalize something that should remain in the civil arena. The statute that refers to theft of labor or services should apply. There are criminal statutes that will apply if there is criminal intent. **SEN. WHEAT** feels the bill is going to far.

SEN. CROMLEY stated this was an ill-planned effort and perhaps requires some consultation with county attorneys. Using criminal laws to enforce civil penalties is difficult, so **SEN. CROMLEY** questions why businesses would want to use criminal laws. **SEN. CROMLEY** feels use of a mechanics lien would be more appropriate and could include attorney fees. He does not like the bill as presented.

SEN. McGEE asked about the codification instruction in an attempt to understand the references to the criminal code and the civil code.

Ms. Lane explained Title 30 includes the Uniform Commercial Code (UCC) and other types of commercial codes. The intent of the

House was to move Section 45-6-309 would be moved to Title 30. This would make the whole thing a civil penalty.

SEN. McGEE felt the bill needed to die because it would move what was a criminal act to a civil offense. The failure to return or pay for merchandise should be a criminal act and there are currently civil remedies available.

Ms. Lane pointed out for the Committee's consideration that, in her opinion, the bill as originally drafted and introduced had a fatally defective title in that it did not give notice to anyone that the bill, as introduced, was making failure to pay rental fees a criminal offense.

CHAIRMAN GRIMES did not support the bill as presented, but stated he would support it with amendment HB033103.ajm, **EXHIBIT(jus60a01)**, which would make it a criminal offense. Regarding all the other options available to businessmen, those options cost money and take an extraordinary amount of time. **CHAIRMAN GRIMES** feels that nine times out of ten, there is criminal intent. He feels this was a measure meant to be preventative.

SEN. McGEE stated the bill could make it a criminal offense to not pay for rented equipment. He submits a rental business owner should take a security deposit for every significant rental. He feels there are different way of obtaining security for the business owner.

CHAIRMAN GRIMES stated the rental businesses need every shred of business that walks in the door and for them to draw too tight a line would limit their business.

SEN. O'NEIL feels making it a criminal offense to not pay for rental of equipment would be a constitutional amendment since the constitution says putting someone in jail for failure to pay is unconstitutional. Once again, **SEN. O'NEIL** stated he feels the theft of services statutes should apply.

CHAIRMAN GRIMES stated there is a difference because the offenders have stolen merchandise, not just refused to pay for it.

Vote: **SEN. CROMLEY's** motion to **INDEFINITELY POSTPONE HB 331 carried** with **Senators Grimes** and **Mangan voting no.**

EXECUTIVE ACTION ON HB 404

Motion: **SEN. McGEE** moved **HB 404 BE INDEFINITELY POSTPONED.**

Discussion:

CHAIRMAN GRIMES is concerned about this bill since it gives carte blanche to employers and allows them to say anything they want. In **CHAIRMAN GRIMES'** mind it will create a double standard regarding what employers are allowed to give with regard to law enforcement officials and raises the questions as to who is properly entitled to the information.

Vote: **SEN. McGEE's** motion **HB 404 BE INDEFINITELY POSTPONED carried 7-2** with **Senators Mangan** and **O'Neil voting no.**

EXECUTIVE ACTION ON HB 448

Ms. Lane explained HB 448 deals with the same subject as HB 54 and the two bills should be coordinated.

Motion: **SEN. McGEE** moved **HB 448 BE TABLED.**

Vote: **SEN. McGEE's** motion **HB 448 BE TABLED carried UNANIMOUSLY.**

SEN. MANGAN commented that everything in HB 448 can be placed in HB 54 and then only one bill will need to come out of the Committee.

Ms. Lane confirmed **SEN. MANGAN's** statement.

EXECUTIVE ACTION ON HB 453

Motion: **SEN. MANGAN** moved **HB 453 BE CONCURRED IN.**

Discussion:

CHAIRMAN GRIMES asked if the word "income" on page 2 needs to be changed to "assets."

SEN. CROMLEY proposed an amendment and gave it to **Rep. Raser** but has not heard back from her. **SEN. CROMLEY** had concerns with subsection (4) because he did not think it was clear the inmate owed money for reimbursement. He did not know if it was in law that the department had the right to collect this money. **SEN. CROMLEY's** proposed amendment would strike subsection (4) and the new language will read: "The inmate is obligated to repay the department all costs reasonably incurred for medical and dental

expenses. The department may take all steps necessary to obtain repayment, including seeking payment from assets not deposited in the account provided for in subsection (1)."

CHAIRMAN GRIMES requested **Ms. Lane** to draft **SEN. CROMLEY's** proposed amendment for consideration by the Committee.

SEN. MANGAN withdrew his motion.

(Tape : 2; Side : A)

HEARING ON HB 456

Sponsor: **Rep. John Parker, HD 45, Great Falls.**

Proponents: **Beth Satre, Montana Coalition Against Domestic and Sexual Violence**
Jim Kembel, Montana Association of Chiefs of Police and Montana Police Protective Association
Jim Smith, Montana County Attorneys' Association
Pam Bucy, Department of Justice
Rep. Michael Lange, HD 19, Billings
Susan Tucker, Training Coordinator, Montana Coalition Against Domestic and Sexual Violence
Mike Barrett, Self

Opponents: **None.**

Opening Statement by Sponsor:

Rep. Parker explained HB 456 will improve our state-wide approach to domestic violence cases. **Rep. Parker** would like to substitute the word "predominant" for the word "primary" and spoke as to why he believed this is a common sense change. History has indicated there are often dual arrests made in cases where the victim fought back resulting in injuries on both parties. In an effort to be more just and fair, there was a primary aggressor doctrine established. This bill will substitute "predominant" for "primary" because applying the definition in *Webster's Dictionary*, the word "primary" can mean "first in time." **Rep. Parker** is trying to avoid the situation where one person tosses a drink in another's face, and that person retaliates by beating the first person mercilessly. Under that scenario, the first person could technically be considered the "primary" offender. The term "predominant" is being used at the Law Enforcement Academy.

Proponents' Testimony:

Beth Satre, representing the Montana Coalition Against Domestic and Sexual Violence, submitted written testimony in favor of HB 456. **Ms. Satre** submitted an excerpt from the *Defense Task Force on Domestic Violence, Second Year Report*,as **EXHIBIT(jus60a02)EXHIBIT(jus60a03).** This report shows that in almost all cases of domestic violence, one party is using violence as a pattern or coercion and intimidation while the other party is merely reacting to that violence. In addition, one person is far less able to stop the violence, and one party is suffering greater injuries and level of fear.

Jim Kembel, representing the Montana Association of Chiefs of Police and Montana Police Protective Association, explained that this legislation will do much in assessing the situation in a domestic abuse case. **Mr. Kembel** testified these are some of the most dangerous situations faced by law enforcement. Passage of HB 456 will give a much better tool to work with.

As a citizen in Helena, **Mr. Kembel** is on the Board of Directors of the Friendship Center and he testified the bill will be a great assistance to the Friendship Center.

Jim Smith, representing the Montana County Attorneys' Association, supports HB 456 because it is a distinction with a difference. The county attorneys have discussed this change in language among themselves and feel it is an appropriate change and will allow them to charge the correct individual in domestic disputes.

Pam Bucy, representing the Department of Justice, supports this bill for all the reasons previously stated.

Rep. Michael Lange, HD 19, Billings, supported the bill on the House Judiciary Committee and feels the bill is a positive step for the people of Montana.

Susan Tucker, Training Coordinator for the Montana Coalition Against Domestic and Sexual Violence, and a Domestic Violence Trainer for the Montana Law Enforcement Academy, stated in training new law enforcement officers, they tell their students that "primary" aggressor should be interpreted as "predominant" aggressor. This adds confusion to the training.

Mike Barrett, representing himself, is a proponent of non-violence and aggressive intervention.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. McGEE asked **Rep. Parker** if it was his intent to make it mandatory for law enforcement to always arrest the man.

Rep. Parker replied certainly not, and explained that he neglected to mention in his opening was that as a deputy county attorney he has prosecuted a number of these cases which included both genders. It could be, in some rare cases, a dual arrest is appropriate. This bill is an attempt to lend additional clarity and guidance.

SEN. McGEE, narrated the definition of "predominant" found in *Webster's Ninth New Collegiate Dictionary*, as a person "having superior strength, influence, or authority." **SEN. McGEE** would like to know under what conditions a female would have the superior strength, influence, or authority.

Rep. Parker explained what he is attempting to accomplish by use of "predominant," more than impose automatic culpability on the male party, is to give a more sensitive analysis of the incident. Every fact situation will be different and will be challenging for law enforcement to address.

SEN. McGEE repeated the definition of "predominant" and asked how many man/woman relationships there are where the woman has superior strength, influence, and authority.

Rep. Parker spoke of a case prosecuted in his office where the male was wheelchair bound, and his female partner had beaten him. The intent is to impose other definitions of "predominant" he found in looking at the dictionary which include preeminent or preponderant. This looks at which person contributed the most to the violence of the situation. In taking it a step further, **Rep. Parker** talked about testimony presented at a hearing before the Senate Public Welfare, Health and Safety Committee showing the spouse abuser is a manipulator who might try to enrage a person to the point where they lash out. This bill will enable law enforcement to have a more thorough and just analysis of the event.

SEN. McGEE retaliated saying he had no idea what **Rep. Parker's** response had to do with his question or the definition of "predominant." **SEN. McGEE** asked who **Rep. Parker** is trying to get arrested.

In providing his most thorough and accurate answer, **Rep. Parker** explained they are trying to ensure the most blame-worthy

individual who contributes the most violence, is the one who is arrested.

SEN. McGEE hypothecated that if a woman hits a man, and the man hits the woman, which person generally has the dominate strength?

Rep. Parker answered that situation may be appropriate for a dual arrest.

SEN. McGEE suggested "predominant" is not the correct word because, according to the definition in the dictionary, the predominant person, in most cases, will be the male.

Rep. Parker respectfully disagreed that would be the outcome of the legislation. **Rep. Parker** feels the word "predominant" has other definitions in the dictionary and will be reinforced through training at the Law Enforcement Academy. It is not the goal to place automatic blame on the male.

SEN. O'NEIL asked if **Rep. Parker** would consider it a friendly amendment to change the word from "predominant" to "most aggressive."

Rep. Parker preferred not to change the term since "predominant" is being applied in a number of jurisdictions around the nation.

SEN. O'NEIL asked if it was **Rep. Parker's** intent to remove the most aggressive person from the situation.

Rep. Parker believed the word "predominant" will allow a more accurate analysis of each criminal investigation.

CHAIRMAN GRIMES stated when they originally placed the language in code, they had an extraordinary amount of discussion about this same word. The problem was both people were being arrested, and in many cases that was not right. "Primary" was never intended to be first, and he is wondering why the courts would interpret it that way.

Rep. Parker stated the courts are not the source of the challenge. It is how an investigating officer responds at the scene. In some cases, law enforcement is arresting the person who initiated the situation rather than the major contributor to the violence.

CHAIRMAN GRIMES asked if the House discussed the possibility of providing a definition of "primary" or substituting other words.

Rep. Parker summarized the House debate as focusing on the need for the legislation and that "primary" really could be interpreted as first in time. They thought the better way to express the primary aggressor concept would be through "predominant" meaning the person who was the greater contributor to the violent situation.

CHAIRMAN GRIMES stated that **Rep. Parker** had done a good job in defining "predominant" as the person who is most blameworthy, contributed the most violence, and the major contributor. **CHAIRMAN GRIMES** stated if the word "predominant is going to create problems, he suggesting adding a definition.

Holly Beall, who provides training for law enforcement officers in domestic abuse situations, stated the primary aggressor statute currently contains a primary aggressor continuum. In teaching law enforcement on how to deal with that continuum, they emphasize working the entire continuum. The word predominant helps with that because it implies the person who contributes most to the violence. This does not include just superior strength, but also includes prior history of violence and relative severity of injuries. Also, injuries can be classified as offensive injuries and defensive injuries. Relative size and apparent strength of each person also comes into play. There are situations where the woman does have superior strength, but we do not hear about those situations. Lack of fear can also be an indicator of who is the predominant party. Witness statements are also factored in.

CHAIRMAN GRIMES explained they originally used "primary" because a woman may use violence when needing to protect herself. **CHAIRMAN GRIMES** is concerned about losing something in the law by substituting "primary" with "predominant."

Ms. Beall replied it is not a concern because they are training law enforcement to ascertain an understanding of the big picture.

(Tape : 2; Side : B)

Factoring the injuries is one of the things law enforcement learn. This is one of the reasons they use skill-based training and put law enforcement through scenarios designed to help them learn. They teach a six-part continuum and how to determine, based on the six parts, who was the most predominantly responsible for the violence.

SEN. MANGAN stated to **Ms. Beall** that he assumes she teaches based on best practice and procedure and not from a definition in dictionary, and Ms. Beall agreed.

SEN. CROMLEY expressed that many times when constructing laws, Legislators are concerned with how the courts will interpret the laws. In this instance, it is important to keep in mind how the officers will be trained and how they will interpret the law. **SEN. CROMLEY** was curious if **Rep. Parker** knew of any court cases which have raised the issue of the term. **Rep. Parker** replied he was unaware of any court cases challenging the term.

SEN. CROMLEY asked about other jurisdictions using the same terms and whether there are model statutes available.

Ms. Bucy replied to the question stating most jurisdictions use the term "predominant." Most places began with statutes that referred to the "primary" aggressor because, at the time, that was the model. That language has now been changed to "predominant," and most states are changing accordingly. This has to do with training issues, not necessarily court or legal issues.

Closing by Sponsor:

In reviewing current law, it occurred to **Rep. Parker** that current law does provide additional definition that is useful. **Rep. Parker** referred the Committee members to lines 25 through 30 and also line 1, on page 2. It is clear current law already provides the definition of "primary" and using the word "predominant" instead of "primary" will lend clarity to confusing situations.

HEARING ON HB 141

Sponsor: **Rep. Michael Lange, HD 19, Billings.**

Proponents: **Rep. John Parker, HD 45, Great Falls**
Col. Shawn Driscoll, Montana Highway Patrol
Jim Kembel, Montana Chiefs of Police Association and the Police Protective Association
Janie McCall, City of Billings
Mike Barrett, Self
Jim Smith, Montana Sheriffs' and Peace Officers' Association

Opponents: **None.**

Opening Statement by Sponsor:

HB 141 will redefine criminal conduct and will increase the penalties from fleeing from or eluding a police officer. This bill has become known as the "high-speed pursuit bill." The bill

was brought about by concerns of **Rep. Lange's** constituents because of high-speed pursuits in Billings which have resulted in property damage, death, and severe concerns of citizens and law enforcement. When Billings law enforcement members completed a survey for **Rep. Lange**, there was 100 percent support for this legislation. Present law provides for penalties for high-speed pursuit as being a term of not less than ten days in jail or more than six months and a fine of not less than $300 or more than $500. A second offense would be not less than 30 days or more than one year and a fine of $500 to $1,000. The original introduced version of the bill would have made this offense a felony and was based upon the model statute in Michigan. At the hearing in the House, the Committee was grid locked. People who lived in rural areas viewed the problem of high-speed pursuit differently than those who lived in urban areas. The bill was tabled twice and both times it was brought off the table in an effort to reach a consensus without creating a designer crime. Amendment HB014103.ajm, **EXHIBIT(jus60a04)**, addresses the concerns of the House and provides for two years in jail or $2,000 or both. **Rep. Lange** explained the amendment will keep the offense a misdemeanor, except if a person causes serious bodily injury the death of another person or causes property damage in excess of $1,000. **Rep. Lange** stated this will not create a designer crime, but it will enhance the sentence of the individual who commits those offenses. **Rep. Lange** asked the Committee to keep in mind that these individuals usually have a very specific purpose for eluding the law. Prosecutors are constantly faced with deciding whether to file charges as a felony or file charges under misdemeanor. This is a real issue in Montana and **Rep. Lange** urged the Committee to pass the bill and amendment.

Proponents' Testimony:

Rep. John Parker, HD 45, Great Falls, was planning on introducing similar legislation because current law treats this situation as something as a "cute" event or a Dukes of Hazard car chase. The fact is it is far more serious and places motorists at risk.

Col. Shawn Driscoll, Montana Highway Patrol, supports the legislation because the Montana Highway Patrol engages in approximately 60 plus pursuits a year. Officers voluntarily terminate many of those pursuits because of the danger to citizens and officers.

Jim Kembel, representing the Montana Chiefs of Police Association and the Police Protective Association, supports the bill.

Janie McCall, City of Billings and on behalf of the Billings Chief of Police, supports this bill.

Mike Barrett, representing himself, testified as a proponent to HB 141.

Jim Smith, representing the Montana Sheriffs' and Peace Officers' Association, supports HB 141, stated that high speed pursuits are of low frequency but are of high risk to law enforcement officers and the citizens of Montana. You cannot always avoid these situations and people who engage law enforcement officers in high-speed pursuits are trying to avoid prosecution.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. O'NEIL asked if there is more than one offense of alluding an officer. Specifically, he asked if it was illegal to allude a police officer on foot or on a bicycle.

Rep. Lange replied that instance would be handled under a different series of statutes. There is clearly a difference between a person engaged in a high-speed pursuit and a kid trying to outrun the law on a bike. This bill only applies to people operating a motor vehicle.

Col. Driscoll responded to the same question stating that a person on foot or a bike could be charged with obstructing a police officer and it is a misdemeanor. In responding to an example presented by **SEN. O'NEIL, Col. Driscoll** stated a person would not be charged for running from the law when they are hooky-bobbing on cars.

SEN. WHEAT asked for clarification that the intent on lines 17 through 19 as it exists is to create a misdemeanor crime.

Rep. Lange explained the bill will make it the highest possible misdemeanor.

SEN. WHEAT expounded that the amendment will create a felony if serious bodily injury or death is caused as a result of a high-speed chase.

Rep. Lange stated that **SEN. WHEAT's** interpretation was correct.

SEN. WHEAT explained making the offense a felony extends the jail time from one year to two years, but leaves the fine the same. He asked if any thought was given to increasing the fine.

Rep. Lange did not give thought to increasing the fine in the amendment. His concern was mainly with making the bill workable,

but did not want to change the bill fiscally. They simply wanted to clarify that there was a difference within the offense for misdemeanor and felony.

(Tape : 3; Side : A)

It would also provide an incentive to the officer to not chase an individual through town by providing for a felony charge when the individual is caught later. He sees this as a double win for law enforcement.

SEN. PERRY asked if the penalty in the amendment coincides with the penalty for negligent homicide and other things in current law regarding vehicular homicide.

Rep. Lange explained that in the second attempt to amend the bill in the House, they proposed to mirror the penalty phrase. By doing that, they created two separate crimes under two separate statutes, which resulted in designer crimes. After the bill cleared the House floor, they came up with the language in the amendment. This language does not create a separate class of crime and keeps in theme with the crimes already present.

CHAIRMAN GRIMES asked **Col. Driscoll** whether the bill will affect whether his officers decide to pursue or back off a fleeing suspect.

Col. Driscoll replied the outcome of the bill will not change the way in which his officer continue or disengage in pursuits. At present, they disengage from approximately one-third of their pursuits. They are in constant review of their pursuit policy and training and what officers do. If they can disengage from a pursuit, that is what they will do. He hopes law enforcement will do better follow up to allow an arrest to be made at a later time when tensions are lower.

CHAIRMAN GRIMES stated there a times when a person does not see or hear siren or lights and will not respond by pulling over. **CHAIRMAN GRIMES** asked if this language will allow law enforcement sufficient discretion in those cases.

Col. Driscoll reported officers deal with that on a regular basis and they can usually tell when people are attempting to allude law enforcement. He is not concerned about the discretion on the part of the officers. **Col Driscoll** commented all their patrol cars are equipped with cameras and those are reviewed at the end of every pursuit to make sure the officers have acted appropriately.

Closing by Sponsor:

Rep. Lange stated if the Committee wanted to replace "knowingly" with "purposely," he would not find it offensive. The reason 10 mph safety margin was placed in the bill was to ensure if an individual went through a town too fast, the local officer would be able to charge him with speeding, not evading the law. The bill is going to solve a severe problem, especially in cities. In cities, there is no room for error. **Rep. Lange** feels the bill can be amended without adding the designer crime element or beefing up the rolls of the Montana State Prison.

HEARING ON HB 293

Sponsor: **Rep. Frank Smith, HD 98, Poplar.**

Proponents: **Pam Bucy, Department of Justice**
Col. Shawn Driscoll, Montana Highway Patrol
Jim Kembel, Montana Association of Chiefs of Police and Montana Police Protective Association
Jim Smith, Montana Sheriffs' and Peace Officers' Association
Beth Brenneman, American Civil Liberties Union of Montana
Bob Worthington, Montana Municipal Insurance Authority
Gene Fenderson, Montana Progressive Labor Caucus
Betty Whiting, Montana Association of Churches
Travis McAdam, Montana Human Rights Network

Opponents: **None.**

Opening Statement by Sponsor:

Rep. Frank Smith, HD 98, Poplar, testified that HB 293 is a non-partisan bill dealing with racial profiling. There is no fiscal impact presented by this bill. The bill will adopt a written policy prohibiting racial profiling by law enforcement. Since 9-11 there has been an increase in occurrence of racial profiling.

Proponents' Testimony:

Pam Bucy, representing the Department of Justice, supports the bill and explained that the racial profiling bill last session failed to get passed because no one believed there was a problem in Montana. As a result of that bill, law enforcement and other individuals, including representatives of the tribes, have met to

discuss the issue of racial profiling. There have now been several allegations of racial profiling, including a high-profiled case in Billings. This is now the number one civil rights violation in the country. As a result of all this, HB 293 will prohibit racial profiling and defines racial profiling and states that race or ethnicity cannot be the sole factor in probable cause for an arrest or the particularized suspicion for a stop. The bill will also require police departments to establish a racial profiling policy and a complaint handling policy. **Ms. Bucy** attended a national symposium on racial profiling and heard testimony on both sides of the issue. Everyone agreed that the best prevention is to train officers appropriately and implement an adequate complaint policy. **Ms. Bucy** reported that every single law enforcement agency has agreed to support this bill. Law enforcement across the state feels this is a pro-active step in handling the issue of racial profiling.

Col. Shawn Driscoll, Montana Highway Patrol, spoke that the Montana Highway Patrol has adjusted its training and policies. They now provide sensitivity training and diversity training. The Montana Highway Patrol polices seven Indian Reservations in Montana and needs to be sensitive to the issue present on those Reservations. **Col. Driscoll** submitted new citation forms utilized by the Montana Highway Patrol, **EXHIBIT(jus60a05)**. All patrol cars now have recording devices to ensure officers' conduct is appropriate. In referring to the citation, **Col. Driscoll** explained the top copy mirrors the bottom copy. The citation requires an officer to disclose the primary reason for the traffic stop. The officer's copy will identify the person's race which will aid in establishing data as to who is being stopped and why.

Jim Kembel, representing the Montana Association of Chiefs of Police and the Montana Police Protective Association, thanked **Rep. Smith** for bringing the legislation and stated they agreed with the proposed law totally.

Jim Smith, representing the Montana Sheriffs' and Peace Officers' Association, also supports HB 293. They have worked with **Ms. Bucy** and other law enforcement agencies over the interim in developing a policy on racial profiling. He feels they can be in compliance with this law by July 1.

Beth Brenneman, representing the American Civil Liberties Union (ACLU) of Montana, urged the Committee to support the bill.

Bob Worthington, CEO of the Montana Municipal Insurance Authority (MMIA), states there is significant liability exposure and this

is a significant issues to the cities and towns insured by MMIA. The MMIA has taken a pro-active approach on helping to eliminate racial profiling.

Gene Fenderson, representing the Montana Progressive Labor Caucus, supports HB 293.

Betty Whiting, representing the Montana Association of Churches, is concerned with the human rights of individuals. They seek equal protection of human dignity through human rights legislation. **Ms. Whiting** quoted the Montana Constitution and reminded the Committee that the Montana Constitution provides equal protection. **Ms. Whiting** shared two examples from her own life of racial profiling and how they affected people. **Ms. Whiting** encouraged the Committee to pass HB 293.

Travis McAdam, representing the Montana Human Rights Network, receives between five and ten complaints of racial profiling a year. The best part of HB 293 is that it allows law enforcement to be pro-active in saying racial profiling is something that should be taken seriously and develops policies to deal with racial profiling.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. O'NEIL asked **Ms. Bucy** how many agencies will be required to adopt a policy on racial profiling if HB 293 is passed.

Ms. Bucy did not have an exact number, but believed it would be over 50 and probably closer to 100.

SEN. O'NEIL asked how long it would take them to adopt a detailed written policy.

Ms. Bucy stated they have adopted several model policies, and those policies have been distributed to both the Montana Association of Counties (MACO) and the Montana League of Cities and Towns. Therefore, she feels it will not take long at all for them to adopt written policies.

SEN. O'NEIL asked if it would be possible to place the gist of the policy in the bill, so they would not have to adopt policies, but rather just abide by the law adopted by the state.

Ms. Bucy recommended allowing them to adopt their own policy. The model policies are quite lengthy, and she feels it would be

more beneficial to allow departments to work the new policies into their existing policies.

SEN. O'NEIL asked if there was different racial profiling occurring in one part of the state versus another part of the state which would require a different policy.

Ms. Bucy answered no, and suggested racial profiling is defined in the proposed statute.

(Tape : 3; Side : B)

SEN. O'NEIL asked **Ms. Bucy** if she could supply the Committee with the model policies, and she agreed.

SEN. McGEE understood **Col. Driscoll** to say they are already doing what was contained in the bill presented last session that was defeated.

Ms. Bucy stated that is not exactly correct and as a result of that bill, they redid the Notice to Appear, Exhibit 5, because they wanted to qualify for some grant money which was available to study the issue of racial profiling.

SEN. McGEE asked what statutory authority they had to implement these new policies.

Ms. Bucy replied the Highway Patrol and Department of Justice have authority to write policies.

SEN. McGEE then wondered why the bill was needed if they already have the authority to adopt policies.

Ms. Bucy responded the bill mandates departments to adopt policies and defines racial profiling, which there is not a definition for racial profiling in Montana law.

SEN. McGEE asked if the Montana Highway Patrol adopted a policy regarding racial profiling, but there was no definition, how did they create a policy for which they had no definition.

Ms. Bucy stated they defined racial profiling within their policy.

SEN. McGEE expounded that if the state does not have a uniform policy on racial profiling and a department adopts a substandard policy, could that lead to a cause of action.

Ms. Bucy surmised the complaint would have to be based on the facts of racial profiling. There may be differences in policies, and that is why they sent out model policies, but she did not think the policy will make them liable for racial profiling since they could be better or worse policies. She hopes they will utilize the model policies.

SEN. McGEE explained that he is not sure the bill is absolutely necessary. He asked **Col. Driscoll** about the Notice to Appear and whether the selections for race has always been present on the citation form.

Col. Driscoll explained that portion of the citation was just instituted July 1, 2002.

SEN. McGEE asked if it could be argued that taking this data is a form of racial profiling.

Col. Driscoll stated the officers do not actually ask a person for their race. The officer documents race as best he can and race does not show up on the offender's copy, only on the law enforcement's copy. The collection of this data is used to show whether there is a concern of racial profiling by an officer.

SEN. McGEE asked if an officer would routinely ask a person their race during a traffic stop.

Col Driscoll stated their policy is to not directly ask a person his race. They would only indicate the person's race on the form if it could be determined by the officer, and then race would only be indicated on the officer's copy. This data is would be used to provide accurate information regarding traffic stops.

SEN. McGEE determined the officer is guessing a persons' race since he cannot directly ask an individual his race.

Col. Driscoll agreed the officer is using his best discretionary judgment in determining race.

SEN. McGEE told **Ms. Brenneman** he did not want unintended consequences to arise out of this bill. Therefore, he asked **Ms. Brenneman** if she could envision a situation where a person could be mistaken to be of a particular race, and that person approaches the ACLU about filing suit because the state does not have uniform racial profiling standards.

Ms. Brenneman replied that when they assess a claim about discriminatory provision of governmental services, they look at all the facts of the situation. If they only saw that someone's

race was identified on a citation and there was nothing more to the claim, they would not pursue the claim. Regarding differing policies, they need to take the issue of policies away from the issue of litigation and realize the policies are for the individual law enforcement agency to ensure they are doing everything correctly. If law enforcement officers follow those policies, they will not be in a situation of having the ACLU ask them about a particular incident. If they are not following those policies, but the policies exist, the policies do not do much to defend a particular action if an officer has violated those polices. A comprehensive policy is better for the law enforcement agent to ensure they do not do the wrong thing. A law enforcement agency cannot effectively defend themselves if their policy is not comprehensive and their officers are not following it.

SEN. McGEE directed **Ms. Brenneman** to the section of Exhibit 5 that indicates whether race is white, Native American, Hispanic, black, Asian, Middle Eastern, or other, and asked if she could identify any civil rights issues that could arise as a result of the Highway Patrol guessing a person's race, not be able to verify a person's race, or just the fact that they are gathering this information.

Ms. Brenneman did not see any immediate concerns. The Billings Police Department has collected this information for quite a long period of time. She did not believe a person could have a claim because they were racially misidentified on a ticket. Statistical information gathered as a result of using this form would be subject to right-to-know provisions. She cannot think of an effective civil rights claim for lack of appropriate identification.

SEN. McGEE asked if there is any reason the Committee should have concern that gathering this information could be viewed as racial profiling.

Ms. Brenneman could not see an apparent civil claim, but she could not speak for every individual who is stopped.

CHAIRMAN GRIMES asked whether in light of 9-11 and heightened national security, whether **Col. Driscoll** would find this limiting in protecting the public and the use of investigatory stops.

Col. Driscoll replied under stop and frisk and other policies, race, in and of itself, should not be a reason to make a stop. **Col. Driscoll** stated they need probable cause to make a stop.

CHAIRMAN GRIMES surmised race could be a factor, but not the sole factor.

Col. Driscoll replied that is correct.

CHAIRMAN GRIMES stated the bill will not apply to the Tribes and require them to have a reverse racial profiling policy.

Ms. Bucy agreed that was correct and elaborated that they have worked with the Tribes on a full-faith and credit concept and have discussed this issue with the Tribes.

CHAIRMAN GRIMES stated there are some jurisdictions in the south who have African American leaders in their communities who feel their sensitivity to racial profiling has eliminated their own internal ability to monitor behavior and make sure conduct is becoming of a civilized society. **CHAIRMAN GRIMES** asked if those elements were considered in drafting this bill.

Ms. Bucy purported they did talk at length with law enforcement about "depolicing." After attending the national conference, this concern is being put aside because training has improved and they are utilizing model training policies. This training maintains racial profiling does not mean stop policing. It does mean writing better reports and being able to articulate your reasons for a stop.

CHAIRMAN GRIMES added that it is extremely important, and the individual dignity section of the Constitution indicates equal protection does not require all persons be treated alike, but rather that all persons be treated alike under like circumstances. **CHAIRMAN GRIMES** then asked if there are other actions that law enforcement takes which could be affected by considerations of race.

Ms. Bucy did not believe that would be the case. The policy is meant to address stopping someone based on race so it should not affect anything other than that. **Ms. Bucy** provided **CHAIRMAN GRIMES** with the new term for racial profiling, which is "bias-based policing." When presented with the new terms, the Tribes preferred use of the term "racial profiling."

SEN. AUBYN CURTISS asked **Col. Driscoll** how many complaints and allegations he has seen because of racial profiling.

Col. Driscoll reported the Highway Patrol makes approximately 100,000 traffic stops a year and receives approximately three to five complaints a year that contain some type of racial profiling

as part of the complaint. There is a perception from time to time that law enforcement engages in that type of behavior.

SEN. CURTISS asked in relation to those allegations what administrative action was taken.

(Tape : 4; Side : A)

Col. Driscoll replied they have not had any substantiated complaints that were specifically racially based.

SEN. CURTISS asked if they already have policies in place relative to the conduct of police officers.

Col. Driscoll replied they do, and they hold their officers accountable for the conduct they display. Part of the reason they support the bill is because there is a perception among citizens that they from time to time engage in behavior that is not appropriate.

SEN. PERRY stated if the rate of occurrence is 5/100,000, then what of those five would result in action against an officer.

Col. Driscoll replied, as far as he could remember, that race was the reason for the stop, the reason for the enforcement, and the reason for arrest. Therefore, none of those complaints have been substantiated. Usually, when the complaint is reviewed, if race is a component of the complaint, then it is addressed.

SEN. O'NEIL asked **Al Smith, representing the Montana Trial Lawyers' Association**, if someone received disparate treatment from law enforcement based upon their race, would someone from MTLA help them sue for this treatment.

Mr. Smith replied racial discrimination would be a type of civil rights claim that a MTLA member may take on.

SEN. O'NEIL followed up stating if someone complained they were treated unfairly, one of the things which an attorney would need to prove is that the police officer considered the individual to be a member of a racial minority.

Mr. Smith conveyed one of the basics for a discrimination complaint is that the plaintiff was a member of a protected class and that they were treated differently because they were a member of that class.

SEN. O'NEIL asked if it would help the case if it could be proven the police officer considered the individual to be a member of the protected class.

Mr. Smith agreed that would be a basic part of the case.

SEN. O'NEIL continued saying it would be helpful to the plaintiff's case if there was a piece of paper noting the individual's race.

Mr. Smith replied his experience would be if a person is Native American or Hispanic that their appearance would determine whether a person was a member of a protected class.

SEN. O'NEIL explained a law enforcement officer will note on the citation the race he perceives him to be. If an individual is suing for disparate treatment based upon race, then you would want to know what race the officer perceived the individual to be. Therefore, the form could be used as evidence by the individual suing.

Mr. Smith could see where the form could be helpful if the officer denied that they considered race. However, he did not feel that would come into play, since a law enforcement officer would freely state they knew the individual was of a minority race.

Closing by Sponsor:

Rep. Smith stated he is carrying the bill because it could clear a policeman of racial profiling, as well as condemn an officer if he were guilty of racial profiling. When a Tribal policeman writes a ticket, it is not racial profiling.

HEARING ON HB 308

Sponsor: **Rep. John Musgrove, HD 91, Havre.**

Proponents: **Jim Smith, Montana Sheriffs' and Peace Officers' Association**

Opponents: **Scott Crichton, American Civil Liberties Union of Montana**

Opening Statement by Sponsor:

Rep. John Musgrove, HD 91, Havre, explained that HB 308 implements a fee against sexual and violent offenders who must register with state and local law enforcement agencies and

requires them to pay for the costs for notifying and disseminating information to a victim, person, group, entity, or the public, and requires the money to be deposited in the general fund. There is a "if able to pay" clause contained in the bill since some of these folks do not have access to good jobs once they exit the penal system. **Rep. Musgrove** directed the Committee to the assumptions which are based on about one-half of the offenders being able to pay.

Proponents' Testimony:

Jim Smith, representing the Montana Sheriffs' and Peace Officers' Association, likes HB 308 because it is the restitution responsibility is properly placed on the individual if they are able to pay. The courts will make the determination as to whether a person can pay.

Opponents' Testimony:

Scott Crichton, representing the American Civil Liberties Union of Montana (ACLU), has discussed this bill with **Rep. Musgrove** and opposed the bill in the House. People who are sentenced for sexual and violent crimes are being punished for the rest of their lives in their mandatory registration. **Mr. Crichton** does not favor adding further burdens to these individuals, who are attempting to become productive citizens. If a person is a class III registrant, he will have to pay $55 times four, resulting in a $220 fee for the rest of their lives. **Mr. Crichton** is concerned this fee will discourage offenders from registering properly or continuing with their treatment. The state's primary concern should be in seeing that these individuals receive treatment and not in creating burdens or barriers to that treatment. **Mr. Crichton** is also concerned about young people who are charged with statutory rape. Regardless of whether that person is a normal heterosexual or a sexual deviant, for the rest of that individual's life, he will be saddled with registering as an offender and paying the registry. **Mr. Crichton** is also concerned because the bill creates a half-time FTE when we are not funding FTE's for programing in the prisons. HB 2 is looking at the funding the Department of Corrections. While the state has created four new facilities, it has not provided sexual offender programs in any of those facilities. **Mr. Crichton** feels the state needs to get its priorities state and decide if it wants people to come out of prison reformed, or if it simply wants to punish these individuals until their last dying day.

Questions from Committee Members and Responses:

SEN. PERRY is struggling with the ACLU being concerned about a person having to pay this fee for the rest of his life, but asked about the victim who has to live with the actions of that person for the rest of the victim's life. **SEN. PERRY** does not understand why he should be concerned about a sexual offender having to pay $200 a year for the rest of his life.

Mr. Crichton stated he is not sure he can convince **SEN. PERRY** that those concerns are valid. **Mr. Crichton** stated when a person commits a crime, they should pay a debt to society. He also feels that when that debt is paid, the individual should be done with that responsibility and be able to get on with his life. Registration prohibits an offender from moving on with his life. Therefore, registration prohibits closure. There is no distinction in registration between people who are real threats, perceived threats, or likely no threats at all. **Mr. Crichton** is not sure whether a half-time FTE will be adequate and is unsure how much time and energy the state will expend in collecting the fees.

SEN. PERRY asked **Rep. Musgrove** if the reason for the bill is the fact that there is a definition of a Class III offender in law that says that person will likely offend again and, therefore, registration was created to protect people.

Rep. Musgrove responded the reason for the bill is offenders who are required to register are creating a burden on society by having society pay for the registration.

SEN. WHEAT, referred to Section 46-23-509 which defines the three classes of sexual offenders. **SEN. WHEAT** asked if the state has a compelling interest in tracking, and requiring payment by the offenders for the cost, of Class III offenders, as opposed to first and second level offenders.

Mr. Crichton could not speak to whether it was a compelling state interest, but believes the state has an interest. The distinctions between the classifications has shifted from the sentencing judge to local law enforcement and that classification is not made based on treatment or therapy the offender may have received while incarcerated.

(Tape : 4; Side : B)

Each offender is treated the same, regardless of their offense, and treated the same for the rest of their days.

SEN. WHEAT asked if thought was given to requiring an offender, at the time of sentencing, to pay a fee to be used for registration fees once the offender is released. This would enable the cost to be commensurate with the level of crime committed. This would allow a distinction to be made between a violent sexual predator and an 18-year-old who has sexual contact with a minor.

Rep. Musgrove had not considered this possibility, but would be amenable to an amendment that would require the distinction being made upon sentencing.

SEN. WHEAT thought if the bill only applied to Class III offenders, it could be covered by current funding and would eliminate the need for hiring a half-time FTE.

Rep. Musgrove stated he would be amenable with that suggestion as well.

SEN. O'NEIL asked if **Mr. Crichton** was of the opinion that registration of sexual offenders was a benefit to society and should be paid by society, rather than viewing registration as a punishment to a sexual offender.

Mr. Crichton had not initially viewing the bill in that context, but agreed with the way **SEN. O'NEIL** presented that view.

Closing by Sponsor:

Rep. Musgrove stated that during the course of bringing the bill, he discussed this issue with probation and parole officers in the Great Falls area and members of the Department of Justice. Individuals in probation and parole were more supportive of the bill than those in the Department of Justice.

EXECUTIVE ACTION ON HB 308

Motion: **SEN. McGEE** moved **HB 308 BE CONCURRED IN.**

Discussion:

SEN. CURTISS wondered if manufacturers of methamphetamine could be amended into the bill.

CHAIRMAN GRIMES stated they are considering registration of methamphetamine manufacturers in another bill. However, the title is too narrow.

Ms. Lane is not sure how the other bill is written.

SEN. WHEAT expressed concerns because there is no hierarchy for the different classes of offenders and he is sensitive to those on the lower end of the scale and will end up having to pay for a crime for the rest of their lives. **SEN. WHEAT** is not comfortable in placing all three offenses in a box and applying the same law to all three classes.

SEN. McGEE responded that jurisdiction over Class I and Class II offenders is time limited.

Ms. Lane was uncertain whether that was true.

SEN. McGEE withdrew his motion.

EXECUTIVE ACTION ON HB 536

Motion: **SEN. CROMLEY** moved **HB 536 BE INDEFINITELY POSTPONED.**

Discussion:

SEN. McGEE stated his conflict resolution bill, SB 389, addresses the issue of mold. This bill has passed the Senate and will be heard next week in the House.

CHAIRMAN GRIMES was concerned there being a chilling effect on landlords checking their property, but was informed that probably would not be a net effect of the bill.

SEN. CROMLEY disagreed saying that would be a direct effect. As an attorney, he would advise a property owner not to have an inspection done.

SEN. PERRY asked **Roger Halver, representing the Montana Association of Realtors,** if he was amenable to excluding landlords from the bill.

Mr. Halver stated they discussed this with **CHAIRMAN GRIMES** and it is their philosophy that they would be happy with half the bill.

SEN. PERRY feels HB 536 is a good bill.

CHAIRMAN GRIMES is sensitive to the problems of property managers when their properties are lived in for a great deal of time and the tenant does not care for the property, and then makes allegations against the landlord. **CHAIRMAN GRIMES** admitted he is a little confused by the language of the bill and the immunity provision.

SEN. WHEAT does not see a reason to pass the bill if references to landlords are removed. This language can be added into rental contracts. The whole issue of the effects of mold is in a state of flux scientifically and **SEN. WHEAT** does not believe it should be placed in statute until there is absolute criteria available. **SEN. WHEAT** feels people can be informed about mold by putting the information into rental contracts.

SEN. PERRY responded there is a similarity between this bill and the rental bill they discussed earlier. The difference is the rental problem discussed earlier is not of such a national magnitude and does not have the monetary and litigation potential as the mold problem. **SEN. PERRY** believes this bill will put teeth into the matter and will give the seller protection against frivolous lawsuits.

SEN. CROMLEY feels the Committee should be clear on what the bill does. It is an anti-disclosure bill. Currently, if a person is buying a home, they will get a disclosure from the seller indicting various things about the home. If this bill passes, the seller could know there is mold, could hide the mold, lie about their knowledge of the mold, and the buyer would have no remedy. The mold disclosure statement must be given about mold being dangerous and that it is being study, but the mold disclosure statement does not make particular reference to the property being sold. If a test for mold is not conducted, the seller is immune.

SEN. MANGAN described amendment HB053601.avl, **EXHIBIT(jus60a06)**, as striking the immunity provision. If that amendment is not adopted, amendment HB053602.avl, **EXHIBIT(jus60a07)**, will place in the already watered down disclosure statement another statement saying the seller or property manager are immune from liability.

SEN. O'NEIL stated an individual may have mold in his house and not know it is there. It would be good to know the mold is there when that individual sells his house. It seems the to him a potential buyer could have the test performed if he is concerned about mold and that report should be made available if the potential buyer does not ultimately buy the home. **SEN. O'NEIL** feels the bill is necessary, but it needs work.

SEN. CROMLEY agrees and would support the bill if amendment HB053601.avl were adopted. As the bill stands, it would protect lying about the existence of mold.

Vote: **SEN. CROMLEY's** motion **HB 536 BE INDEFINITELY POSTPONED failed** by roll call vote, with **Senators Cromley, Mangan, Pease, and Wheat voting aye.**

(Tape : 5; Side : A)

Motion: **SEN. PERRY** moved **HB 536 BE CONCURRED IN.**

Motion: **SEN. MANGAN** moved **Amendment HB053601.avl BE ADOPTED.**

Discussion:

SEN. MANGAN explained this amendment will strike the immunity provision on page 3, lines 13 and 14.

CHAIRMAN GRIMES pointed out that the statute regarding radon gas has the exact language as the bill regarding immunity.

Vote: **SEN. MANGAN's** motion that **Amendment HB053601.avl BE ADOPTED failed** by roll call vote, with **Senators Cromley, Mangan, Pease, and Wheat voting aye.**

Motion: **SEN. MANGAN** moved **Amendment HB053602.avl BE ADOPTED.**

Discussion:

SEN. MANGAN explained this will add the language in the amendment to the disclosure language and is an attempt to make the disclosure be a full disclosure and making the seller or landlord not liable simply because they presented a mold disclosure statement.

SEN. JERRY O'NEIL feels the amendment is good and, if the amendment is adopted, he will be moving to strike Section 2 of the bill and would be unnecessary.

Vote: **SEN. MANGAN's** motion that **Amendment HB053602.avl BE ADOPTED carried 6-3** by roll call vote with **Senators Curtiss, Perry, and Grimes voting no.**

Motion: **SEN. PERRY** moved **HB 536 BE CONCURRED IN AS AMENDED.**

Motion: **SEN. O'NEIL** moved subsection (2), page 3, beginning at line 4, be stricken.

Discussion:

SEN. O'NEIL stated this section requires the seller or landlord to provide the results to a buyer or tenant. However, sometimes the seller or landlord will not have the results of tests. In addition, the rest of the language in the section was addressed

by amendment HB053602.avl. **SEN. O'NEIL** feels this section detracts from the bill.

CHAIRMAN GRIMES stated it seems to him that a seller puts a buyer on notice that the property should be tested and gives the buyer that discretion. The buyer could then require the seller to perform that test. **CHAIRMAN GRIMES** is not sure why **SEN. O'NEIL** has a problem with the language.

SEN. O'NEIL explained that the language says whenever a seller or landlord knows the building has been tested, he has to provide the buyer or tenant with a copy of the results. **SEN. O'NEIL** pointed out the test could have been performed by a previous purchaser and the seller may not have access to those results. **SEN. O'NEIL** opined that test results could also be used as a scam against sellers and landlords.

SEN. WHEAT pointed out that if a test is conducted each party will have a copy of the inspection. A party does not get to hide information from the other parties. **SEN. WHEAT** does not support **SEN. O'NEIL's** amendment because he does not believe that is the way things will happen in the real world.

SEN. O'NEIL agreed the buy/sell agreement does provide for the purchaser to inspect the property but does not say the seller has to pay for the test. If the potential purchaser pays for the test, he will not be required to give the results to the Seller. This will either force the potential purchaser to pay for a test that benefits for the seller, or will allow the potential purchaser to sell the test results.

Vote: **SEN. O'NEIL's** motion to strike subsection (2), page 3, beginning at line 4 **failed** with **Senators Cromley and O'Neil voting aye.**

Motion: **SEN. WHEAT** moved **Amendment HB053601.avl**, Exhibit 6, **BE ADOPTED.**

Discussion:

SEN. WHEAT would like the Committee to reconsider adopting this amendment because the other amendment takes the contents of subsection (3) and puts into what has been amended in. Therefore, the language can be removed because it has been placed in by Amendment HB053602.avl.

SEN. McGEE will resist the amendment because now there is a disclaimer statement based upon what is in law. Subsection (3)

must remain so there is a basis for that inclusion of **SEN. MANGAN's** previous amendment in the disclosure statement.

SEN. CROMLEY agreed with **SEN. McGEE** because where they put in the language will add it onto the disclosure statement.

SEN. WHEAT withdrew his motion.

SEN. CROMLEY made one last passionate argument against the bill and spoke of a case in his law firm where a couple purchased a home with mold and that mold had purposely been concealed by the seller. If the sale had gone through, they would have had no recourse despite the fact the mold had been hidden from them. As long as the seller gives this statement, the buyer will have no recourse.

Motion: **SEN. MANGAN** proposed a simple conceptual amendment on page 1, line 25, striking "at least one" and insert "a separate".

Discussion:

SEN. MANGAN spoke of a case in Stockett, Montana, where children nearly died because of exposure to mold. This issue concerns **SEN. MANGAN** greatly, particularly with the immunity provision. The standard document runs the disclosure together, and he feels it is an important enough issue to warrant putting the disclosure on a separate form to draw the buyer's attention to the disclosure.

Vote: **SEN. MANGAN's** proposed amendment to strike "at least one" on page 1, line 25, and insert "a separate" **carried UNANIMOUSLY.**

SEN. WHEAT feels the Committee is rushing too fast to lay blanket immunity in an area where the unintended consequence will be cutting off the ability of some people who may have legitimate claims. In **SEN. WHEAT's** opinion there are no frivolous lawsuits. The unintended consequence will be cutting off someone's right to seek compensation when they have been injured and have a legitimate claim. Mold is an emerging area in science, as well as the legal arena. **SEN. WHEAT** feels passing this bill will compound the problem.

SEN. CROMLEY made one final comment saying there ought to be a duty to disclose what you know. If a seller knows there is mold present, he ought to inform the buyer.

SEN. O'NEIL declared he may have a potential conflict of interest because he has two buildings presently for sale, one of which had a leaky roof that has been repaired and the other building still

has a leaky roof. He is unaware of any harmful mold in either building, but would like to disclose this information because he would not want to be held liable.

SEN. PERRY feels there are cases where someone may lie if they know there is mold present. **SEN. PERRY** proclaimed that he was sued on a case where he told the truth about flooding on the property as indicated by the presence of sandbags. There is no question in **SEN. PERRY's** mind that frivolous lawsuits exist.

SEN. WHEAT disclosed that he is a landlord and is still going to vote against HB 536.

SEN. CROMLEY stated in the past the majority of his work has been defense work. Every lawsuit he defended was frivolous and every plaintiff's case he worked on was not frivolous. **SEN. CROMLEY** told of a case where a home was sold where it turned out there was no plumbing in the bathroom; however, when inspecting the property, there was water in the toilet. This was a deliberate deception. Right now the laws require people to tell what they know. This bill says a person does not have to tell what they know. As long as a seller gives a potential buyer this printed piece of paper, a seller can hide the mold and is not responsible to the buyer.

SEN. PERRY responded that he took that exact point to the proponents of the bill and suggested the bill could be strengthened by requiring that if the seller is aware of the existence of mold, but there has been no test, that the seller be required to provide such information, in writing, to the buyer. **SEN. PERRY** was cautious feeling the seller could potentially be held liable for new mold which is the result of the actions of the buyer.

(Tape : 5; Side : B)

SEN. CROMLEY stated without the bill, as long as a person tells the truth, they could not be held responsible. His concern is when a seller knows there is a problem.

SEN. PERRY agrees and he also would like the truth to be told.

SEN. CROMLEY made an analogy with buying a used car and asking if the car had ever been in a major accident. If the seller gave you a notice stating buying a used car that has been involved in an accident can be dangerous and that statement absolves the seller from liability, then the buyer could ask if the car had been in an accident. If the seller responds no, and the buyer does not do an inspection before buying the car, then the buyer

would have no recourse. This bill will just require the seller to give the statement saying mold can be dangerous, sir, good luck in your new home.

CHAIRMAN GRIMES asked if a person received that document in their closing statement, would they have been able to say they want the home inspected therefore offering protection since they have been alerted that they may need to check for mold.

SEN. CROMLEY responded that there has been a radon disclosure statement used for a number of years, but that does not always cause people to inspect for radon. **SEN. CROMLEY** supposed there are a lot of people who would not check further into the issue of mold.

SEN. PERRY asked about other issues a seller could lie about, stating he is uncertain how to deal with liars.

SEN. CROMLEY responded if a toilet backed up there is recourse. If you have a sophisticated buyer, they will not believe what the seller tells them and will perform all the inspections. Typical homeowners will not question that closely what the seller tells them.

Vote: **SEN. PERRY's** motion **HB 536 BE CONCURRED IN AS AMENDED failed** 3-6 by roll call vote with **Senators Curtiss, O'Neil,** and **Perry voting aye.**

Motion: **CHAIRMAN GRIMES** moved **HB 536 BE INDEFINITELY POSTPONED.** The motion **carried 6-3** with **Senators Curtiss, O'Neil** and **Perry voting no.**

ADJOURNMENT

Adjournment: 12:30 A.M.

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SEN. DUANE GRIMES, Chairman

_____
CINDY PETERSON, Secretary

DG/CP

EXHIBIT(jus60aad)